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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/057,089	01/25/2002	Frank G. Liedl JR.	F1103/1(V)	3328

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EXAMINER	
PRATT, HELEN F	
ART UNIT	**PAPER NUMBER**
1761	

DATE MAILED: 03/24/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)	
	10/057,089	LIEDL ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *02 February 2006*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,3-5,7,9,10,12,14,16 and 20* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,3-5,7,9,10,12,14,16 and 20* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1, 3, 4, 5, 9-11, 12, 14, 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wong et al. '357 in view of Wong et al. '645 and further in view of Walling et al. (5,230,919) and further in view of Meade (6,010,737).

Wong '357 discloses a nut butter containing nut ingredients, seasonings, stabilizer, emulsifier and bulking agents with a particle size distribution of which 90% of the particles are less than 40 microns, and 50% of the particles are smaller than about 10 microns (abstract and col. 20, lines 18-25). Claims 1, 7 and 12 differ from the reference in the limitation that 1.4% of the particles are larger than 58.7 microns and 10% are smaller than 2 microns and a particular spreadability. Wong et al. '645 disclose that it is known that chunky type peanut better is made with larger peanut granules (col. 1, lines 54-55) and that nut spreadability is determined by the particle size of the nuts (col. 1, lines 65-70 and col. 2, lines 1-10). Nothing new is seen in the use of 10 % of the particles being below 2 microns in size absent a showing that this is not a common occurrence in grinding of nuts. It would have been within the skill of the ordinary worker to grind to particular sizes, as shown by the references. Claims 1, 18-20 further require a span from 2.5 to 6. As the claimed size of particles has been shown

above, the span would have been as claimed. Walling et al. disclose that it is known to use amounts within the claimed SPAN and has 80% nut solids of the claimed size (abstract). Therefore, it would have been obvious to vary the nut particle size in order to achieve a particular spreadability as shown by Wong '645 in the process of Wong '357 and to add large size peanut granules to make chunky type peanut butter as shown by Wong '645 in the process of Wong '357 and to have a SPAN size as claimed.

Claim 1 further requires particular viscosities of from 6,000 to 14,000 centipoises. Meade discloses a viscosity of 6,000 to 50,000 centipoises, which discloses the claimed range (col. 10, lines 26-30). Therefore, it would have been obvious to use a viscosity as disclosed by Meade in the composition of Wong '357.

Claims 3 and 9 further require nuts, a nut slurry or defatted nuts and claim 4, nut oil and claim 5, the use of peanut ingredients. Ground peanuts can be used as in claims 3 and 5 (col. 3, lines 50-61 (Wong '357). Therefore, it would have been obvious to make a nut butter using the claimed ingredients as shown by the combined references.

Claims 4 and 10 further require nut oil in the composition. Wong '357 discloses the use of oil as in triglycerides (col. 6, lines 56-70). Also, nuts inherently contain a lot of oil. Therefore, it would have been obvious to substitute nut oil in place of triglycerides as they are both oils and it would have been obvious to use nut oil since nuts inherently contain oil.

The limitation as to grinding once is seen to be a process limitation in a composition claim, which is not given weight. Even so, grinding once as in claim 14 is found in col. 5, lines 30-34. Therefore, it would have been obvious to grind the nuts once.

Claims 7 and 12, 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wong '357 in view of Wong '645 as applied to the above claims above, and further in view of Meade.

Claim 7 further requires that the composition is a reduced fat nut spread and that 10% of the particles are smaller than about 2 microns. Wong et al. '357 disclose a reduced fat spread (col. 18, lines 60-70, and col. 19, lines 1-9). Wong et al. '357 disclose that 30% of the particle sizes are less than 6.2, which encompasses 2 microns (abstract). Nothing unobvious is seen in using 10% of very small particles instead of 30% absent a showing of unexpected results. Also, Wong et al. '357 disclose that 91.5% of the particle sizes are 3.8 microns or greater, which means that 8.50% are smaller than 3.8 microns. Less than 3.8 microns also reads on smaller than "about 2 microns". It is seen that 3.8 microns reads on about 2 microns absent a showing of unexpected results using 10 % of the particles being 2 microns. Therefore, it would have been obvious to make a reduced fat spread as shown by the combined references. The further limitations of claim 12 have been discussed above and are obvious for those reasons.

The limitation as to grinding once is seen to be a process limitation in a composition claim, which is not given weight. Even so, grinding once as in claim 16 is found in col. 5, lines 30-34. Therefore, it would have been obvious to grind the nuts once.

ARGUMENTS

Applicant's arguments filed 2-2-06 have been fully considered but they are not persuasive. Applicants argue that the characteristics of the nut butter are obtained through the one-step process of the invention. However, process limitations are not given weight in a composition claim. Also, no mention is made of a one step grinding process in the independent claims.

Applicants argue that the nut paste of the '357 is monomodal, which has 50 to 100% of the nut paste being particle sizes of less than 21.6 microns. However, applicant's claims recite that at least 50% of the particles are smaller than 10 microns, which reads on the above. Nothing is seen to exclude the use of a low calorie oil.

Applicants say that 10% of the particles is not shown. However, Wong et al. '357dislose particle sizes being less than 10.1 microns, which reads on less than 2 microns (abstract). Applicants do not say what unexpected results are derived from this limitation.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should

you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 3-18-06

H. Pratt

HELEN PRATT
PRIMARY EXAMINER